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Supreme Court, U.S.
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No. 03-1601

In the Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,

Petitioners,

v.

MARK J. ABRAMS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LOCAL GOVERNMENTS AND RELATED ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF LOCAL GOVERNMENTS AND RELATED ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

Amicus Michigan Coalition To Protect Public Rights-Of-Way (PROTEC) was formed in 1996 by several Michigan cities interested in protecting their citizens' control over public rights-of-way and their right to receive fair compensation for use of public property. Since PROTEC's formation, the residents and businesses of numerous cities, villages, and townships have benefited from the allied efforts of the coalition. PROTEC represents jurisdictions of all sizes through coordinated lobbying and litigation efforts at both the state and federal levels.

Amicus Texas Cities Coalition for Utilities Issues (TCCFUI) is an unincorporated nonprofit association of Texas cities concerned with issues involving telecommunications, gas, and electric utilities. TCCFUI has as members more than 100 cities in Texas, including many of the State's largest cities. TCCFUI represents the interests of its member cities in part by participating in legal, legislative, and regulatory activity affecting the rights of cities with respect to rights-of-way and utility issues.

Amici County of San Diego, California, City of San Diego, California, City of Los Angeles, California, City and County of San Francisco, California, City of Santa Fe, New Mexico, and City of Tucson, Arizona, are local governments as that term is

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

used throughout the Communications Act. See, *e.g.*, 47 U.S.C. § 253(c). *Amici* have been, or may be in the future, defendants in litigation under 42 U.S.C. §§ 1983 & 1988, seeking damages and attorneys' fees for "violations" of federal statutes.

Amicus California State Association of Counties (CSAC) is a non-profit corporation, with membership consisting of the 58 counties in the State of California. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, composed of county counsel throughout the State. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties in California.

Amicus League of California Cities is an association of 474 cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee, which is composed of 24 city attorneys representing all 16 divisions of the League from all parts of the State. The committee monitors appellate litigation affecting municipalities and identifies those that are of statewide significance.

Amicus Nevada Association of Counties (NACO) is a nonpartisan, nonprofit corporation founded in 1924 and composed of Nevada's county governments. NACO represents the interests of its members before all branches of both the state and the federal government.

Amicus League of Oregon Cities (LOC) is a voluntary association of 239 incorporated cities throughout the State of Oregon. LOC was founded in 1925 and pursues a core mission of working for strong, livable communities. In pursuit of its mission, LOC represents the common interests of its members on issues of critical concern to cities.

Amicus Association of Oregon Counties (AOC) is a volunteer-membership organization that represents all 36

Oregon counties. Its mission is to strengthen county government's ability to serve people.

Amici or their members are local municipal government organizations with authority that has been expressly preserved by the Communications Act—including the responsibility for making decisions on applications for permits to construct wireless service facilities (see 47 U.S.C. § 332(c)(7)) and managing use of the public rights-of-way by telecommunications carriers (see *id.* § 253). Under the reasoning of the court of appeals below, *amici* or their members potentially are subject to damages liability and attorneys' fees for exercising their reserved powers in ways that are later determined to violate the Communications Act. Such a regime threatens to impose crippling damage awards and attorneys' fees on local governments that can ill afford even the relatively minor expenses of defending against litigation. Because of their substantial experience with the specific legal issues in this case, their experience defending against suits under 42 U.S.C. § 1983 in general, and their understanding of the broader ramifications of the rule announced by the Ninth Circuit, *amici* are well situated to brief the Court on the merits of this case.

STATEMENT

The issue in this case is whether a cause of action under 42 U.S.C. § 1983, with the attendant attorneys' fees provision, 42 U.S.C. § 1988, is available when Congress has passed a preemptive statutory scheme with comprehensive remedial provisions as it did in the enactment of Section 704 of the Telecommunications Act of 1996 (TCA), 47 U.S.C. § 332(c)(7). Section 704 provides for expedited judicial appellate review of local zoning decisions to ensure compliance by state and local governments with its provisions. The section also provides for expedited judicial review for "[a]ny person adversely affected by any final action or failure to act by a State or local government," and in some circumstances (not relevant here) provides a right to "petition the [Federal Communications] Commission for relief." *Id.* § 332(c)(7)(B)(v).

The district court held that the scheme of judicial review granted it "broad authority to fas[hio]n an appropriate remedy that would bring expedited relief." Pet. App. 32a. And the Third Circuit earlier concluded that Section 332(c)(7)(B)(v) "provides judicial remedies that incorporate both notable benefits"—including expedited judicial review—"and corresponding limitations"—such as a short limitation period and no provision for damages or attorneys' fees. The court of appeals below became the first circuit to hold that the Communications Act's remedial scheme—with its "benefits" and "limitations"—would give way to a cause of action under Section 1983.[2]

The result reached by the court of appeals below is wrong because it eviscerates the congressional intent behind Section 332(c)(7)(B)(v); "remove[s] * * * completely the protection of the 'American Rule'" governing attorneys' fees (*Maine* v. *Thiboutot*, 448 U.S. 1, 25 (1980) (Powell, J., dissenting)); and "cannot be reconciled with the purposes for which § 1983 was enacted" (*ibid.*). "[I]t is only violations of *rights*, not *laws*, which give rise to § 1983 actions" (*Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283 (2002)), and the exceptionally weak foundation—if any—for concluding that Section 332(c)(7) confers private rights is all the more reason why Section 1983 remedies should not be engrafted onto it.

A. The Statutory Scheme

Congress passed the TCA, Pub. L. No. 104-104, 110 Stat. 56 (1996), to amend the Communications Act of 1934 and "accelerate rapidly private sector deployment of advanced communications to all Americans" by providing for a "pro-competitive, de-regulatory national policy framework." H.R. CONF. REP. NO. 104-458, at 113 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 124. That goal was accomplished in part by

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[2] A panel of the Eleventh Circuit reached the same result, but its decision was vacated. See *AT&T Wireless PCS, Inc.* v. *City of Atlanta*, 210 F.3d 1322 (11th Cir. 2000), vacated, 260 F.3d 1320 (11th Cir.) (en banc), dismissed following settlement, 264 F.3d 1314 (2001).

selectively preempting state and local laws and regulations that Congress determined were contrary to the purposes of the Communications Act. See, *e.g.*, 47 U.S.C. § 332(c)(7)(B) ("Limitations"); *id.* § 253(a) (no prohibition on the ability of any entity to provide telecommunications service).

At the same time, Congress took great pains to *preserve* state and local authority when it was not inconsistent with the purposes of the Communications Act. See, *e.g.*, 47 U.S.C. § 332(c)(7)(A) ("[n]othing in this chapter shall limit or affect the authority of a State or local government"); *id.* § 253(c) ("[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers"). The preservation of state and local authority was also reflected in a general "savings clause," which states:

> (1) No implied effect. – This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

Pub. L. No. 104-104, § 601(c)(1), reprinted at 47 U.S.C. § 152, historical and statutory notes.

1. Section 332(c)(7) reads, in pertinent part:

> (7) Preservation of local zoning authority
>
> (A) General authority
>
> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
>
> (B) Limitations
>
> (i) The regulation of the placement, construction, and modification of personal wireless service

facilities by any State or local government or instrumentality thereof–

* * *

> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

* * *

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be * * * supported by substantial evidence * * *.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days * * *, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act * * * that is inconsistent with clause (iv) may petition the Commission for relief.

The section is unambiguously a preemption provision, but it also *precludes* preemption by "preserv[ing] local zoning authority" except in enumerated circumstances. 1996 U.S.C.C.A.N. at 222 (section "preserves the authority of state and local governments over zoning and land use matters except in the limited circumstances set forth"); see also *VoiceStream Minneapolis, Inc.* v. *St. Croix Cty.*, 342 F.3d 818, 829 (7th Cir. 2003) (local governments "retain the authority to regulate the siting of wireless telecommunications facilities" subject to "procedural and substantive limitations" found in Section 332(c)(7)(B)(i)-(iv)). Congress's intent could not be any clearer: the inroads to state and local regulatory authority are only those expressly provided in Section 332(c)(7). The statutory language "except as provided in this paragraph" (Section 332(c)(7)(A)) plainly precludes the importation of liability under Sections 1983 and 1988.

Section 332(c)(7)(B)(v) enables an aggrieved party to seek a remedy in federal court if a state or local zoning authority makes a decision that exceeds the limitations set out in clauses (i) through (iv) of subparagraph (B). It expressly permits federal court review and requires that such review be conducted "on an expedited basis." Section 332(c)(7)(B)(v).

The history of litigation under clause (v) demonstrates that it has proved effective in achieving its purpose. Courts—including the district court in this case—have regularly granted injunctions when remedying violations of Section 332(c)(7)(B). See Pet. App. 13a-15a; see also, *e.g.*, *Cellular Tel. Co.* v. *Town of Oyster Bay*, 166 F.3d 490 (2d Cir. 1999); *Omnipoint Comm'ns, Inc.* v. *Village of Tarrytown Planning Bd.*, 302 F. Supp. 2d 205, 226 (S.D.N.Y. 2004); *USCOC of Va. RA #3, Inc.* v. *Montgomery Cty. Bd. of Supervisors*, 245 F. Supp. 2d 817 (W.D. Va.), rev'd, 343 F.3d 262 (4th Cir. 2003). In cases in which the local government's zoning decision is not preempted by Section 332(c)(7)(B), reviewing courts reach the opposite result. See, *e.g.*, *Voice Stream PCS I, LLC* v. *City of Hillsboro*, 301 F. Supp. 2d 1251 (D. Or. 2004). No doubt can exist that parties have effective means for federal court review.

2. Other provisions of the Communications Act also operate to preempt state and local regulatory authority in the telecom arena. For example, 47 U.S.C. § 253—a provision

governing state and local right-of-way regulations and compensation for use of the right-of-way, the operation of which is very important to *amici* and their members—reads in part:

> (a) In general
>
> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> * * *
>
> (c) State and local government authority
>
> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers * * *.
>
> (d) Preemption
>
> If * * * the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement, to the extent necessary * * *.

The section "is intended to remove all barriers to entry," and "preempts" regulations that undermine that purpose, while also providing a safe harbor for actions of state and local governments regarding management of rights-of-way and requiring fair and reasonable compensation. 1996 U.S.C.C.A.N. at 138. It therefore "focuses on limiting the actions of local government." *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258, 1265 (10th Cir. 2004).

Like Section 332(c)(7), Section 253 accomplishes its purpose. Plaintiffs have brought preemption challenges to state or local regulations with jurisdiction premised on 28 U.S.C. § 1331. See *City of Santa Fe*, 380 F.3d at 1264. "'A plaintiff

who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question * * *.'" *Ibid.* (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983)); see also *Qwest Corp.* v. *City of Portland*, 385 F.3d 1236 (9th Cir. 2004) (remanding to the district court for additional consideration of the preemption issue).

B. The Proceedings in this Case

Respondent is an individual who constructed a wireless-service antenna more than 50 feet tall on his property—although his permit allowed only 40 feet, and required nighttime "nesting" at 30 feet in height. Also in violation of the permit, which allowed only amateur use, respondent engaged in both amateur and commercial uses. When respondent was enjoined to comply with the amateur use restriction, he applied for a conditional use permit, which would allow commercial use as well. Pet. App. 2a. The City Council of Rancho Palos Verdes denied respondent's application. Pet. App. 2a; see *id.* at 23a. During the administrative proceedings, respondent's counsel recognized that the purpose of Section 332(c)(7)(B) was to protect "the end user of the services," not the "individual who has a license." Admin. Rec. 54.

1. As was his right under the Communications Act (see Section 332(c)(7)(B)(v)), respondent appealed the city council's denial to federal district court. Pet. App. 16a-17a. He appended a claim for money damages under 42 U.S.C. § 1983. Pet. App. 17a. The district court held that the denial of a conditional use permit violated the Communications Act, because the decision was not "supported by substantial evidence contained in the written record" (Section 332(c)(7)(B)(iii)). Pet. App. 30a. The court then noted its "broad authority to fas[hio]n an appropriate remedy that would bring expedited relief" to respondent. *Id.* at 32a (citing authorities granting mandamus and injunctive relief). The court granted complete injunctive relief to respondent, ordering petitioners within 14 days "to adopt a new resolution

granting plaintiff a Conditional Use Permit," and retained jurisdiction to hear future disputes in connection with the injunction. *Id.* at 14a-15a. The district court held, however, after ordering briefing on the question, that "the remedies available to plaintiff are subsumed under the TCA, and that damages pursuant to 42 U.S.C. § 1983 are not available to plaintiff." *Id.* at 14a.[3]

2. Respondent appealed the denial of damages under Section 1983. The Ninth Circuit held that respondent had the burden to establish the violation of a federal "right." Pet. App. 3a-4a. The court then held that there was a rebuttable presumption of entitlement to remedies under Section 1983. *Ibid.* In the court of appeals' view, the remedies available to a plaintiff claiming that the denial of a permit violated Section 332(c)(7)(B)—a right of action in federal court on an expedited basis and a right to petition the Federal Communications Commission for relief—were not adequately "comprehensive" to "'close the door on § 1983 liability.'" *Id.* at 4a-5a (quoting *Blessing* v. *Freestone*, 520 U.S. 329, 348 (1997)). The court of appeals apparently would have preferred that the Communications Act contain "remedies such as damages, injunctions, attorney's fees, or costs." Pet. App. 5a.[4] The court of appeals then considered the "savings" clause (Section 601(c)(1)), which, it held, demonstrated Congress's express intent to preserve the Section 1983 remedy. Pet. App. 10a.

[3] Because respondent was not the "prevailing party" on the Section 1983 claim under the district court's holding, he had no entitlement to attorneys' fees under 42 U.S.C. § 1988. And because "[i]n contrast to a plaintiff who prevails, defendants are severely limited as to when they may obtain attorney's fees under Section 1988" (Brett D. Baber, *For Every Right There Is a Remedy: Civil Rights Litigation Pursuant to 42 U.S.C. § 1983*, 9 ME. B. J. 226, 233 (1994)), petitioners had no way to recover the expenses incurred in litigating the Section 1983 claim.

[4] The court rejected the contrary holding of the Third Circuit in *Nextel Partners, Inc.* v. *Kingston Township*, 286 F.3d 687 (3d Cir. 2002), arguing that "the TCA contains *procedural*, rather than *remedial*, provisions." Pet. App. 8a-9a (emphasis in original).

SUMMARY OF ARGUMENT

The Ninth Circuit erred in concluding that respondent could assert a Section 1983 claim, with attorneys' fees under Section 1988 if the claim is successful, based on the fact that petitioners' decision to deny respondent's application for a conditional use permit was held preempted by Section 332(c)(7)(B)(iii). No basis exists for a Section 1983 claim here.

I. A claim under Section 1983 for a violation of a federal statute exists only if the statute creates rights enforceable under that section. The question that has divided the courts of appeals is whether the remedial scheme of Section 332(c)(7) impliedly forecloses resort to Section 1983. But—as the Solicitor General correctly observed in his brief in the *Gonzaga* case—that question should not be divorced from the question whether the statute creates private rights, for the entire inquiry is one into congressional intent. Whether a federal statute creates a "right" enforceable under Section 1983 turns on three factors.

Applying the first factor—whether the statute was intended to benefit the putative plaintiff (see *Gonzaga*, 536 U.S. at 284)—demonstrates that there is no such right under Section 332(c)(7). That is especially the case where, as here, the statutory scheme in question is a preemption scheme. See *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103, 106 (1989). The second factor, which asks whether the right asserted under the statute is sufficiently clear to be enforced in court, also militates against a finding of a "right" here.

II. Even if Section 332(c)(7) is determined to create "rights," its remedial scheme is fully comprehensive. Permitting suit under Section 1983 frustrates—even eviscerates—the scheme Congress created. The injunctive remedy is a natural outgrowth of the body of zoning law that underlies Section 332(c)(7), in which expedited judicial review and remedies limited to injunctive relief are the norm and

damages remedies often are prohibited by statute. It is thus natural to interpret Section 332(c)(7) not to permit damages or attorneys' fee awards. The section is enforced instead by injunctive relief. See, *e.g.*, *Primeco Personal Comm'ns Ltd. P'ship* v. *City of Mequon*, 242 F. Supp. 2d 567, 582 (E.D. Wis.) ("Most courts have held that the appropriate remedy [under Section 332(c)(7)(B)(v)] is an order to issue the relevant permit."), aff'd, 352 F.3d 1147 (7th Cir. 2003). Additionally, the 30-day limitation period and requirement of expedited review are "notable benefits and corresponding limitations" (*Nextel Partners, Inc.*, 286 F.3d at 694) that would be undermined by permitting suit under Section 1983.

The savings clause supports this conclusion. As this Court recently has held, a savings clause "does not create new claims that go beyond" the claims that otherwise would exist. *Verizon Comm'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 878 (2004). And the savings clause preserves "State and local law" just as it does federal law. California state law—like that of many other States—does not permit the imposition of damages or attorneys' fees in a suit based on a discretionary permitting decision. See CAL. GOV'T CODE § 818.4. The Section 1983 remedy undermines those laws.

III. The harms attendant on overuse of Section 1983 counsel against permitting its use in this statutory scheme. Litigation under Section 332(c)(7) and the similar Section 253 (applicable to right-of-way management and compensation) already is substantial and very expensive, and promises to increase if damages remedies and attorneys' fees are allowed. The local government defendants in these cases (usually small cities and towns) have limited resources and often are barely able to afford the cost to defend the lawsuit. The natural result of the Ninth Circuit's approach would be to encourage municipalities to grant permits that maybe should not be granted, rather than run the risk of incurring crippling litigation expenses. Nothing indicates that Congress had such a one-sided result in

mind when it expressly *preserved* local government authority to continue to make the zoning decisions they always have made.

ARGUMENT

It is nonsensical to conclude, as the Ninth Circuit panel did below, that by specifically *failing* to provide for damages and attorneys' fees in a suit challenging a zoning decision as pre-empted by the Communications Act, Congress meant for those remedies to be available through Section 1983 and Section 1988. The holding below boils down to this: if the remedies Congress made available under a federal statute are not the kind of remedies *that a court* thinks sufficient, it is appropriate to permit suit under Section 1983. If that rule prevails, Congress will be required in the future expressly to *disavow* enforcement through Section 1983—a result that cannot be reconciled with this Court's instruction that the necessary inquiry is "whether Congress *intended to create a federal right*." *Gonzaga*, 536 U.S. at 283 (emphasis in original).

Instead, in this case the Court should apply the rule—which it unanimously accepted in 1997—that to sue under Section 1983 plaintiffs are required to assert the violation of a federal right, not merely a violation of federal law. *Blessing*, 520 U.S. at 340. Even if they do so, Section 1983 remedies are available only to the extent that they are not inconsistent with the statutory scheme. *Id.* at 341; see also *Three Rivers Center for Indep. Living, Inc.* v. *Housing Auth. of the City of Pittsburgh*, 382 F.3d 412, 419-422 (3d Cir. 2004).

I. Section 332(c)(7) Does Not Create Rights Enforceable Through a Cause of Action Under Section 1983

The court of appeals held "that the TCA clearly grants enforceable 'rights'" (although the question does not seem to have been disputed by the parties). Pet. App. 4a (citing *Blessing*, 520 U.S. at 340-341). Likewise, the Seventh Circuit held in *Primeco Personal Comm'ns Ltd. P'ship* v. *City of Mequon*, 352 F.3d 1147, 1152 (7th Cir. 2003), also without analysis: "local

officials violated a federal right of the plaintiff." But, contrary to these conclusions, an analysis of Section 332(c)(7) demonstrates that it is by no means clear that respondent has rights enforceable under Section 1983. As respondent's counsel conceded, "the focus of the statute" is "to protect the end user of the services"—*not* "to protect the individual who has a license." Admin. Rec. 54.

The "rights" issue, though apparently not disputed below, is an indispensable corollary of the question whether Section 1983 remedies are available under the Communications Act. As the Solicitor General has argued:

> Because the "key to the [Section 1983] inquiry is the intent of the legislature," the less clear the evidence that Congress intended to create private rights, the more carefully the court should scrutinize the impact of a Section 1983 action on the enforcement mechanisms that Congress expressly provided.

Brief for the United States as Amicus Curiae Supporting Petitioners, *Gonzaga Univ.* v. *Doe*, 536 U.S. 273 (2003) (No. 01-679), at 23-24 (citation omitted), available at http://www.usdoj.gov/osg/briefs/2002/3mer/1ami/2001-0679.mer.ami.pdf. The view of the Third and Seventh Circuits that the Section 1983 and 1988 remedies are incompatible with the comprehensive remedial scheme under Section 332(c)(7)(B)(v) is bolstered by a correct analysis of the private-right issue.[5]

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[5] The issue of rights under the Communications Act is particularly important because it has the potential to affect numerous similar statutory provisions. For example, although it is not at issue in this case, Section 253 also is a preemption provision that is sometimes erroneously invoked in disputes over tower siting. Although the Court need not address the interplay of Section 253 and Section 1983 in a case in which Section 253 is not directly at issue, it is important for the Court to understand the Section 253 litigation, because the reasoning of the lower courts in some of the Section 253 cases may help shed light on the issues that *are* directly presented here. Like Section 332(c)(7), Section 253 preserves some state and local regulatory authority—most notably to manage the public rights-of-way. The section also preempts certain state or local regulations without mentioning what parties are intended to benefit from the preemption. As the Tenth Circuit recently observed in holding that a telecommunications carrier suing under Section 253 did not have a remedy under Section 1983: "The language * * * focuses on limiting the actions of local government not on protecting a benefitted class." *City of Santa Fe*, 380 F.3d at 1265. Despite some differences between Section 332(c)(7) and Section 253 (see 380 F.3d at 1267), the same reasoning should be applied here.

Whether a federal statute creates a right enforceable under Section 1983 turns on an evaluation of three factors:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States.

Blessing, 520 U.S. at 340-341 (citations omitted).[6] Importantly, not every violation of a federal statute constitutes a deprivation of a federal *right*. *Golden State*, 493 U.S. at 106. "Personal rights are those intentionally and 'unambiguously conferred' through 'rights-creating' language." *Three Rivers*, 382 F.3d at 419-420 (quoting *Gonzaga*, 536 U.S. at 283, 284).

The first *Blessing* factor is perhaps the most important. This Court recently has elucidated that rights-creating language in a federal statute must "unmistakabl[y] focus on the benefited class." *Gonzaga*, 536 U.S. at 284. It is not enough that the Act create a class of beneficiaries. "Congress" must have "intended to confer federal rights upon those beneficiaries" for a Section 1983 suit to be available. *California* v. *Sierra Club*, 451 U.S. 287, 294 (1981). The fact that an individual, like respondent, is benefited, does not mean that Congress intended to confer on

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[6] We do not dispute that the third factor is met, but for the reasons given below the first and second factors are not.

that individual a right to sue under Section 1983. "[T]he question whether a statute *is intended to benefit* particular plaintiffs is quite different from the question whether the statute *in fact benefits* those plaintiffs * * *." *Pennsylvania Pharmacists Ass'n* v. *Houstoun*, 283 F.3d 531, 535 (3d Cir. 2002) (en banc); see also *Three Rivers*, 382 F.3d at 419.

This Court requires that the statute contain "rights-creating language." See *Cannon* v. *University of Chicago*, 441 U.S. 677, 693 n.13 (1979). In *Cannon*, the statutes being interpreted spoke directly to the putative plaintiff. See *id.* at 693-694. In *Golden State*, the Court held that the National Labor Relations Act (NLRA) creates rights. That Act contained this policy statement: "'It is the purpose and policy of this chapter to prescribe the legitimate rights of both employees and employers in their relations affecting commerce.'" 493 U.S. at 110 n.6; see also *Livadas* v. *Bradshaw*, 512 U.S. 107, 133-134 (1994). But rights-creating language is not held to exist when the statute "focus[es] on the person regulated rather than the individuals protected." *Alexander* v. *Sandoval*, 532 U.S. 275, 289 (2001).

The reference in Section 332(c)(7)(B)(v) to "[a]ny person adversely affected" does not demonstrate a rights-creating focus on would-be antenna builders, but—through its generality—just the opposite. When Congress wished to identify a specific class of beneficiaries and use rights-creating language in the Communications Act, it knew how to do so. See, *e.g.*, 47 U.S.C. § 276(b)(1)(A) ("the Commission shall * * * establish a per call compensation plan to ensure that *all payphone service providers* are fairly compensated for *each and every* completed intrastate and interstate call") (emphasis added).

Unlike Section 276(b)(1)(A), Section 332(c)(7)(B) does not "unmistakably focus" on respondent, or on a class of potential plaintiffs of which he is a member. Rather, the subparagraph focuses on state and local governments. It specifically lists four things that "any State or local government" must, or must not, do, without reference to what person or entity is the intended beneficiary of these requirements and prohibitions. In fact, the

only clause of subparagraph (B) that references potential plaintiffs—clause (v)—states a scheme for judicial review that is *alternative* to, and inimical to, the Section 1983 claim respondent presses here. See pp. 24-28, *infra*.

In *Qwest Corp.* v. *City of Santa Fe*, 224 F. Supp. 2d 1305 (D.N.M. 2002), aff'd in part, rev'd in part, 380 F.3d 1258 (10th Cir. 2004), the court noted: "Section 253 was enacted as part of a series of amendments to the Communications Act of 1934. As originally enacted, '"[t]he Communications Act of 1934 did not create new private rights."' Thus, if Congress had intended Section 253 to create new private rights that could be enforced under Section 1983, one would have expected this change to be noted more clearly." *Id.* at 1315 (quoting *Howard* v. *City of Burlingame*, 937 F.2d 1376, 1379 (9th Cir. 1991), in turn quoting *Scripps-Howard Radio* v. *FCC*, 316 U.S. 4, 14 (1942)). That analysis applies with equal force to Section 332(c)(7)(B).

Furthermore, the *reason* why Section 332(c)(7)(B) places some constraints on local zoning decisions is not because those who wish to erect antennas—unlike victims of discrimination (*Cannon*) or low-income individuals in need of federal assistance (*Wright* v. *City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418 (1987))—are people Congress particularly wished to protect. Rather, like many other provisions of the Communications Act, Section 332(c)(7)(B) seeks to advance the *public* interest.[7] Section 332(c)(7)(B) strives to prevent unreasoned or unreasonable zoning decisions from interfering with the building of the infrastructure necessary to support the Nation's system of wireless communications. Those who build that infrastructure are beneficiaries of Section 332(c)(7)(B), but not all beneficiaries of a statute are given personal rights of the

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[7] "[T]he purpose of the Telecommunications Act is not to benefit individual plaintiffs but to 'protect the public interest in communications.'" *Conboy* v. *AT&T Corp.*, 241 F.3d 242, 254 (2d Cir. 2001) (quoting *Lechtner* v. *Brownyard*, 679 F.2d 322, 327 (3d Cir.1982), in turn quoting *Scripps-Howard Radio*, 316 U.S. at 14)).

sort that can be enforced under Section 1983 or an implied private right of action. See *Three Rivers*, 382 F.3d at 419.

The application of the second *Blessing* factor in this case also counsels against construing the Communications Act to grant rights enforceable under Section 1983. More than one provision of Section 332(c)(7)(B) implicates this factor. This case was decided under the "substantial evidence" standard of Section 332(c)(7)(B)(iii) (Pet. App. 25a-26a), a notoriously indefinite standard of review found throughout the body of federal administrative law. "As early as 1999, one court felt there was 'little agreement among the courts as to the meaning of substantial evidence under the TCA.'" Timothy J. Tryniecki, *Cellular Tower Siting Jurisprudence Under the Telecommunications Act of 1996 – The First Five Years*, 37 REAL PROP. PROB. & TR. J. 271, 279 (2002) (quoting *Primeco Personal Comm'ns, L.P.* v. *Village of Fox Lake*, 35 F. Supp. 2d 643, 645 (N.D. Ill. 1999)). The standard has variously been described to mean "more than a mere scintilla, but less than a preponderance"; "not a large or considerable amount of evidence"; and "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Tryniecki, *supra*, 37 REAL PROP. PROB. & TR. J. at 279 (internal quotations omitted).

Other cases arise under Section 332(c)(7)(B)(i)(II). The circuits are split on how to interpret the preemption of zoning decisions that "have the effect of prohibiting the provision of personal wireless services." *Ibid.* In *AT&T Wireless PCS, Inc.* v. *City Council of Virginia Beach*, 155 F.3d 423, 428-429 (4th Cir. 1998), the Fourth Circuit held that sub-clause (II) applied only to blanket bans on wireless infrastructure, not to individual zoning decisions. In *Sprint Spectrum, L.P.* v. *Willoth*, 176 F.3d 630, 642-643 (2d Cir. 1999), the Second Circuit adopted a more liberal interpretation, holding that it applied in any case in which a remote user lacked access to wireless facilities. See also *Omnipoint Comm'ns Enters., L.P.* v. *Zoning Hrg. Bd.*, 331 F.3d 386, 397-398 (3d Cir. 2003). Finally, in *Second Generation Props. L.P.* v. *Town of Pelham*, 313 F.3d 620, 633-634 (1st Cir. 2002), the First Circuit held that zoning-board decisions that deny individual providers the opportunity to fill gaps in their networks are preempted. Like the substantial evidence standard of clause (iii), the conflicting interpretations of effective prohibition under sub-clause (II) render that preemption provision—if it could be called a "right" at all—so "vague and amorphous" that its violation cannot give rise to a suit under Section 1983. Were the rule otherwise, localities would be forced to guess at which of the many standards might govern their decision, at the pain of enormous penalties if they should guess wrong.

Moreover, Section 332(c)(7) properly is understood to be a preemption provision. *Town of Amherst* v. *Omnipoint Comm'ns Enters., Inc.*, 173 F.3d 9, 16 (1st Cir. 1999); see also pp. 5-7, *supra*. "A federal statutory right or right of action is not required where a party seeks to enjoin the enforcement of a regulation on the grounds that the local ordinance is preempted by federal law." *City of Santa Fe*, 380 F.3d at 1266. "Given the variety of situations in which preemption claims may be asserted * * *, it would obviously be incorrect to assume that a federal right of action pursuant to § 1983 exists every time a federal rule of law pre-empts state regulatory authority." *Golden State*, 493 U.S. at 107-108. Preemption provisions are interpreted instead simply to grant priority to federal laws that conflict with state or local laws, by operation of the Supremacy Clause. As noted above, the NLRA preemption scheme in *Golden State* was accompanied by unambiguous rights-granting language. In this case, by contrast, "congressional pre-emption benefits particular parties" such as respondent "only as an *incident* of the federal scheme of regulation." *Id.* at 109 (emphasis added).

II. Sections 1983 and 1988 Are Irreconcilable with the Comprehensive Remedial Scheme Under Section 332(c)(7)(B)(v)

Even if it is possible to conclude that Section 332(c)(7)(B) creates substantive rights enforceable under Section 1983, the support for that proposition is shaky enough to cast serious

doubt on the claim that Congress intended to permit Section 1983 remedies to supplement and to supplant the statutory enforcement scheme. The comprehensive scheme of judicial review that Congress did enact precludes resort to the remedies of Sections 1983 and 1988.

A. The court of appeals correctly concluded that a plaintiff who successfully appeals, under Section 332(c)(7)(B)(v), a permit denial by a local government is not entitled by the force of that section alone to damages, costs, or attorneys' fees. Pet. App. 5a. Congress instead intended the section to operate in the same manner as does any appellate review provision, permitting the reviewing court to order the decisionmaker below—usually a local zoning board—to reach a contrary decision. See 1996 U.S.C.C.A.N. at 223 (noting that an aggrieved party "appeals" a decision denying a permit); see also *Primeco*, 352 F.3d at 1151 (discussing arguments for and against a "remand" to municipal authorities, and noting that the main argument against remand is delay).

1. That Section 332(c)(7) simply imports local zoning law, refining it to fit the purposes of the Communications Act, is apparent from the title of the paragraph: "Preservation of local zoning authority." Local governments retain the authority to make the decisions they always have made "regarding the placement, construction, and modification of personal wireless service facilities." Section 332(c)(7)(A). The substantial evidence requirement "is a procedural safeguard which is centrally directed at whether the local zoning authority's decision is consistent with the applicable [local] zoning requirements." *ATC Realty, LLC* v. *Town of Kingston*, 303 F.3d 91, 94 (1st Cir. 2002) (internal quotations omitted). Also in keeping with the usual scheme for contesting zoning decisions—which in most States involves a process such as an appeal, a writ of mandamus, or a proceeding in certiorari (see, *e.g.*, IND. CODE § 36-7-4-1003(a); MASS. GEN. LAWS ANN. ch. 249 § 5; VA. CODE ANN. § 15.2-2314)—Congress allowed review of a permit denial "in any court of competent jurisdiction." Section 332(c)(7)(B)(v).

This case, and other appeals brought under the section, demonstrate that preserving this traditional appellate review process for wireless siting decisions has been successful. Permit denials that are preempted by the section have been remedied in as little time as several months by a court order instructing the local zoning boards to grant the permits. See *Village of Tarrytown*, 302 F. Supp. 2d 205 (five months); *Montgomery Cty. Bd.*, 245 F. Supp. 2d 817 (six months). This case is one in which respondent was awarded complete relief when the district court issued an injunction ordering the local zoning board to grant the conditional use permit within two weeks of the court's final order. Pet. App. 14a-15a. Allowing further remedies under Sections 1983 and 1988 would confer a windfall where none is necessary.

2. Appeals from zoning-board decisions historically have not been treated as actions for damages. In California specifically, but in many other States as well, local governments actually are *immune* from damages when plaintiffs successfully appeal zoning decisions. See CAL. GOV'T CODE § 818.4. The scheme of zoning-board decisions and judicial review unambiguously was imported into Section 332(c)(7) by the "[p]reservation of local zoning authority." Congress also was clear that no other limits were placed on local zoning authority as it related to wireless service facilities. See Section 332(c)(7)(A).

The decision from the Seventh Circuit holding that the Communications Act's comprehensive remedial scheme prevented resort to Section 1983 contained dictum about the remedies that might be available under Section 332(c)(7)(B)(v), which, according to that court, might include damages as well as injunctive relief. See *Primeco*, 352 F.3d at 1152-1153. The Third Circuit in *Nextel Partners* likewise observed, "the availability of all appropriate remedies is generally presumed." 286 F.3d at 695 n.6. But the court in *Nextel Partners* continued: "As a matter of practice, however, the typical relief in cases like the one before us has been injunctive. Four district

courts have expressly held that damages are not available under the TCA itself." *Ibid.* (citations omitted).

The approach those district courts have taken to remedies under Section 332(c)(7)(B)(v) undoubtedly is the correct one. In *Franklin* v. *Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 66 (1992), this Court once again "recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court." Following that venerable rule requires courts to ask what remedies are "appropriate." In *Franklin*, the plaintiff sued over egregious and intentionally tortious conduct, quite unlike the failures to grant a conditional use permit at issue here. See *id.* at 63-64 (recounting sexual harassment and rape of a minor). *Franklin* thus specifically distinguished between the more limited remedies that might be available "when the alleged violation was *unintentional*," and those available for an "*intentional*" violation. *Id.* at 74. Under *Franklin*'s analysis of "appropriate" remedies for a violation of a federal statute, there is nothing inconsistent about concluding, as most courts have, that injunctive or mandamus relief is the appropriate recourse for zoning decisions that do not comport with the limitations on local zoning-board authority found in Section 332(c)(7)(B).

This Court has since refined the *Franklin* rule for determining the appropriate remedies for violations of federal rights created by Spending Clause legislation. In *Barnes* v. *Gorman*, 536 U.S. 181, 187 (2002), the Court held that—consistent with the contract-law nature of Spending Clause legislation—the "appropriate" remedies included those to which the state or local government anticipated being subjected when it agreed to participate in the federal scheme. "A remedy is 'appropriate relief' only if the funding recipient is on notice that by accepting federal funding, it exposes itself to liability of that nature." *Ibid.* (internal citation omitted). *Barnes* demonstrates that, contrary to the Seventh Circuit's dictum (*Primeco*, 352 F.3d at 1152-1153), the question of "all appropriate remedies" is not the end of the analysis, but only the beginning. In the case of

zoning-board decisions later held to be preempted, the "appropriate" remedy on appeal is simply a reversal of the decision.

B. The Communications Act contains a "comprehensive" remedial scheme for a plaintiff complaining of an improper permit denial. The Court should follow the analysis of the comprehensiveness of the remedies available under Section 332(c)(7)(B)(v) adopted by the Third Circuit in *Nextel Partners*: "[T]he remedial scheme provided by the TCA * * * is comprehensive in the relevant sense: it provides private judicial remedies that incorporate both notable benefits and corresponding limitations." 286 F.3d at 694. That court pointed to the opportunity for expedited federal review, which "may provide speedy redress for violations of the Act." *Id.* at 695. It also noted the "corresponding limitation[]" of the 30-day filing requirement. *Id.* at 694-695. By contrast, the Ninth Circuit simply—and incorrectly—held that Section 332(c)(7)(B)(v) "contains no remedies at all." Pet. App. 7a. It instead termed the bold new power granted federal courts in clause (v) to entertain appeals from local zoning decisions "procedural" (*id.* at 6a), thus trivializing the Act's alteration of the federal-state balance and creation of a new federal remedy even while erroneously elevating the same provision to the status of a private "right." See pp. 13-19, *supra*.

1. In *Middlesex Cty. Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), this Court stated the test for determining whether a federal statutory scheme permitted suit seeking remedies under Section 1983. "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude a remedy." *Sea Clammers*, 453 U.S. at 20. In that case, the Court held that the substantive Acts contained "enforcement mechanisms" that were sufficiently comprehensive to preclude suit under Section 1983. *Ibid.*

The remedial scheme at issue in *Sea Clammers*, 453 U.S. at 13-14, though "unusually elaborate," did not give any greater remedial powers to *private individuals* (as opposed to the gov-

ernment) than does the remedial scheme under Section 332(c)(7)(B)(v). That statutory scheme permitted private individuals to "seek judicial review" of actions by the EPA Administrator. *Sea Clammers*, 453 U.S. at 13-14. Additionally, private persons could "sue for injunctions to enforce these statutes," if they first complied with specified procedures. *Id.* at 14. The private suit provisions were, like those at issue here, subject to procedural burdens far more stringent than those under Section 1983—including "in most cases" a 60-day advance-notice-of-suit requirement (*Sea Clammers*, 453 U.S. at 15) and, in certain circumstances, a 120-day limitations period (see 33 U.S.C. § 1319(g)(6)(B)(ii)). In *Sea Clammers*, as here, there also was no indication that individuals had statutory authorization to sue for *damages*. 453 U.S. at 14.

Although the Seventh Circuit in *Primeco*, 352 F.3d at 1152, held that *Sea Clammers* is "distinguishable because the Telecommunications Act is silent on remedies beyond merely conferring a right to sue to enforce the Act," the *private* remedial scheme in that case was functionally indistinguishable from the remedies available under clause (v): the citizen-suit provisions "authorize[d] private persons to sue for injunctions to enforce the[] statutes." *Sea Clammers*, 453 U.S. at 14; cf. *Primeco*, 242 F. Supp. 2d at 582 (canvassing authorities and concluding that "the appropriate remedy is an order to issue the relevant permit").

2. The remedial scheme available under clause (v) therefore is "comprehensive" in the relevant sense: it gives "any court of competent jurisdiction" power to entertain an appeal of a zoning-board decision in and cabins that right with a 30-day limitation. Section 332(c)(7)(B)(v). In "fasten[ing], barnacle like" "general remedial statutes" (*Primeco*, 352 F.3d at 1153) to create remedies where Congress had created none, the Ninth Circuit's holding below does just what this Court disparaged in *Smith* v. *Robinson*, 468 U.S. 992 (1984). "[W]hen a statute creates a comprehensive remedial scheme, intentional 'omissions' from that scheme should not be supplanted by the

remedial apparatus of § 1983." *Id.* at 1003. Rather than interpreting the statute to provide the remedies that Congress intended to make available, the Ninth Circuit held that—because other remedies it thought appropriate were not specifically provided—the gaps must be filled in by permitting suit under Section 1983. See Pet. App. 5a ("the TCA does not explicitly provide for any types of remedies such as damages, injunctions, attorney's fees, or costs").

The effort of the court below to distinguish *Sea Clammers* was particularly misguided. The court merely noted that, in *Sea Clammers*, "the two rights-creating statutes at issue had 'unusually elaborate enforcement provisions.'" Pet. App. 6a (quoting *Sea Clammers*, 453 U.S. at 13). Initially, even this distinction is insupportable. See pp. 23-24, *supra* (comparing the injunctive remedy in *Sea Clammers* with the remedy usually applied under Section 332(c)(7)(B)(v)). The attempt at distinguishing *Sea Clammers* also highlights the Ninth Circuit's willingness to subordinate Congress's intent to its own view of an appropriate remedial scheme. The court noted that this Court had held the remedial scheme in *Sea Clammers* to be what Congress considered "'appropriate,' and refused to read more into it." Pet. App. 7a. In this case, by contrast, according to the court of appeals: "While one may argue that the lack of any damages in the TCA is evidence that Congress impliedly intended to foreclose damages, a better justification for the absence of a remedial provision is that Congress intended to preserve an aggrieved plaintiff's right to invoke § 1983." Pet. App. 7a. But nothing supports the Ninth Circuit's preference for the latter justification.

The availability of attorneys' fees under Section 1988 for a successful plaintiff is especially at odds with the remedies provided in the Communications Act. Section 1988 provides advantages to plaintiffs clever enough to couch violations of the Communications Act as remediable under Section 1983—even though attorneys' fees have no basis in federal law or in traditional state handling of appeals from zoning decisions. Cf.

Maine v. *Thiboutot*, 448 U.S. at 25 (Powell, J., dissenting) (noting the danger of eviscerating the "American Rule": "[I]ngenious pleaders may find ways to recover attorney's fees in almost any suit against a state defendant.").

3. Contrary to the holding of the court below (Pet. App. 10a-12a) and to respondent's arguments in this Court (Br. in Opp. 19-20), nothing about the savings clause (Section 601(c)(1)) demonstrates a congressional intent to "preserve" the Section 1983 remedy. This Court has never interpreted a "savings clause" to grant remedies that did not otherwise exist, and recently held that the antitrust savings clause (Section 601(b)(1)) "does not create new claims that go beyond existing * * * standards" under the relevant preexisting body of law. *Trinko*, 124 S. Ct. at 878. That holding applies with equal force to Section 601(c)(1).

"Section 1983 is only a vehicle for substantive claims that have their base elsewhere. It is not an independent source of constitutional or statutory rights." Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 22 (1985). The Section 1983 cause of action exists only if Congress has explicitly granted rights enforceable through litigation under the statute. See pp. 15-16, *supra*. To interpret the savings clause to preserve Section 1983 rights would be to elevate Section 1983 to the status of substantive law—a position that *amici* are unaware it ever has been held to occupy. For this reason, this Court in *Sea Clammers* had no difficulty holding that Section 1983 remedies were not available, despite the presence in that case of a statutory savings clause. 453 U.S. at 20 n.31 (holding that the savings clause was intended "to allow further enforcement of antipollution standards arising under *other* statutes or state common law").

In fact, an analysis of the language in the savings clause leads to the opposite conclusion. The clause protects *state* and *local* laws, unless the Communications Act "expressly" provides that they are "modif[ied], impair[ed], or supersede[d]."

Section 601(c)(1). The court below failed to appreciate that, by interpreting Section 332(c)(7)(B)(v) to import Section 1983, it interpreted the Communications Act to do just what Section 601(c)(1) says it does not.[8]

Under California law, "[a] public entity is not liable for an injury caused by the * * * denial * * * of * * * any permit * * * where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued." CAL. GOV'T CODE § 818.4. "Every state has some" similar "discretionary function exception" to liability (Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis:* United States *v.* Gaubert *and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447, 489 (1997)) that may be violated by permitting damages remedies against a local government entity for making zoning decisions later determined to be preempted.

Likewise, California and other States have laws adopting the "American Rule" for attorneys' fees. See, *e.g.*, CAL. CIV. PROC. CODE § 1021. By awarding fees to a successful plaintiff, Section 1988 abrogates the American Rule. See *Maine* v. *Thiboutot*, 448 U.S. at 25 (Powell, J., dissenting); *Primeco*, 352 F.3d at 1152 (if Section 1983 remedies are permitted, "the American rule goes out the window"). The application of Section 1988 to appeals under the Communications Act modifies state laws regarding attorneys' fees as well, in contravention of Section 601(c)(1).[9]

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[8] Even without the express savings clause, this Court has held that "matters left unaddressed" in a comprehensive and detailed federal statutory provision "are presumably left subject to the disposition provided by state law." *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 85 (1994).

[9] More even than permitting state laws to be trumped in violation of the savings clause, the Ninth Circuit's rule imposes an inequity that the States adopting the American Rule have sought to avoid—permitting only a prevailing plaintiff, not a prevailing local government, to seek attorneys' fees.

III. Allowing Section 1983 Remedies in this Context Produces Results that Congress Did Not Intend

The provisions of Section 1983 and Section 1988 were enacted to protect "socially marginal, unpopular, and impecunious" individuals with causes of action against "well-funded public officers in cases whose social and political significance may dwarf the monetary stakes." *Primeco*, 352 F.3d at 1152. Nothing about zoning-board decisions, or appeals of adverse decisions under Section 332(c)(7)(b)(v), fits this paradigm. Just the opposite is true. Plaintiffs—telecommunications companies or entrepreneurs such as respondent—are able to finance their own litigation, at least as effectively as are parties to other court proceedings subjected daily to the "American Rule" for attorneys' fees. And defendants in these cases can easily be "small towns, such as Mequon, population 21,000, with a planning commission some of whose members double as aldermen." *Primeco*, 352 F.3d at 1152.

The burdens of defending litigation under both Sections 332(c)(7) and 253 already is substantial and often extremely expensive. "[S]ection 332(c)(7) of the TCA has been highly litigated. In slightly over five years since the first reported case, at least 113 federal and 17 state decisions have construed the TCA." Tryniecki, *supra*, 37 REAL PROP. PROB. & TR. J. at 272. Moreover, the "'statute fairly bristles with potential issues, from the proper allocation of the burden of proof through the available remedies for violation of the statute's requirements.'" *Id.* at 273 (quoting *Town of Oyster Bay*, 166 F.3d at 494). The limitation on local zoning authority that the district court held was violated in this case—the requirement under Section 332(c)(7)(B)(iii) that a permit denial be supported by substantial evidence—is "the most elusive and litigated tenet" of the statute. Tryniecki, *supra*, 37 REAL PROP. PROB. & TR. J. at 272. This litigation promises only to increase if attorneys' fees and damages under Sections 1983 and 1988 are added to the appellate-review remedy that the section already provides.

Commentators have noted the challenges facing local zoning boards under Section 332(c)(7). "Wireless facilities, such as a cellular antenna tower or Personal Communication Systems (PCS) monopole, face the classic [Locally Undesirable Land Uses] consumer conundrum: consumers want their cellular, PCS, or Specialized Mobile Radio (SMR) service on demand, and at an affordable price, but few consumers want to allow the service's physical infrastructure to infiltrate their neighborhood." Kevin M. O'Neill, Note, *Wireless Facilities Are a Towering Problem: How can Local Zoning Boards Make the Call Without Violating Section 704 of the Telecommunications Act of 1996?*, 40 WM. & MARY L. REV. 975, 975-976 (1999). This produces a seemingly irreconcilable tension between wireless providers, which "want rapid system development and taller, more powerful facilities," and local governments, which "want to choose the precise placement of wireless facilities and make those facilities as unobtrusive as possible." *Id.* at 988-989.

So long as the remedy available in judicial review of zoning decisions that are preempted by Section 332(c)(7)(B) is limited to an injunction, local governments can continue to assert their zoning authority consistent with congressional intent. But, under the rule announced by the Ninth Circuit in this case, judicial review would be augmented by claims for damages and attorneys' fees. Such a rule would tie the hands of local governments. As *amici* noted in a brief filed with this Court urging the grant of certiorari in this case, one not atypical case recently settled in California for $250,000 threatened attorneys' fees liability of $640,000—nearly 0.5% of the municipality's annual budget—under the Ninth Circuit rule. Local Gov't Cert.-Stage Br. 19.

This result is antithetical to Congress's intent. In the context of Section 253, Congress expressed concern for the costs that would be imposed on local governments to "travel frequently to Washington, D.C., to defend their actions before the FCC." *Qwest Corp.*, 224 F. Supp. 2d at 1315 (citing 141 CONG.

REC. S8170 (daily ed. June 12, 1995) (statement of Sen. Feinstein); *id.* at S8306, S8308 (daily ed. June 14, 1995) (statement of Sen. Gorton)). "Requiring governments to pay their opponent's attorneys' fees pursuant to Section 1983 and 42 U.S.C. § 1988 whenever a court determines that local laws are preempted would upset this delicate balance" and violate congressional intent. *Qwest Corp.*, 224 F. Supp. 2d at 1315-1316. Likewise, under Section 332(c)(7)(B)(v), it is unrealistic to impute to a Congress concerned about burdening local governments even with travel expenses an intent to impose the much larger expense of damages and attorneys' fees.

Contrary to this congressional concern for local governments' costs, the necessary result of affirming the Ninth Circuit's ruling would be greatly to encourage municipalities to grant permits to construct cell-phone towers, despite the legitimate concerns of zoning boards and citizens. The result is exacerbated by the one-sided attorneys' fees scheme under Section 1988: only those challenging a permit denial under Section 332(c)(7)—not local governments defending decisions not to grant a permit, and not citizens opposing permits—may seek attorneys' fees if successful. Although the Seventh Circuit thought it a "gross[] overstate[ment]" to imagine a "forest of cell-phone towers" (*Primeco*, 352 F.3d at 1151), the one-sided incentives under the Ninth Circuit rule threaten just that result.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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